SHAIBHI MILLION
versus
ENVIRONMENT AFRICA
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 22 September 2021 and 13 October 2021

Urgent chamber application

R.T. Mutero, for the applicant
N. Mugandiwa, for the 1st respondent
No appearance for the 2nd respondent

MUREMBA J: This is an urgent chamber application for stay of execution pending determination of an application for rescission of a default judgment which was granted against the applicant for failure to file an appearance to defend the summons that was issued against him by the first respondent.

In response to the urgent chamber application, the first respondent raised three points *in limine*, *viz*: the matter is not urgent; there was material non-disclosure of some facts in the matter; and the applicant cannot seek a final relief for stay of execution in an urgent chamber application.

At the hearing of the matter Mr. *Mugandiwa* for the first respondent abandoned the first two points *in limine* after I had made it clear that the point *in limine* on urgency had no merit. The issue of material non-disclosure is an issue which touched on the merits of the case and would be best dealt with during argument on the merits.

Argument was made in respect of the third point *in limine,* about the applicant seeking a final relief for stay of execution in an urgent chamber application.

It is common cause that although this application was instituted as an urgent chamber application, the applicant is seeking a final order for stay of execution pending determination of the application

for rescission of the default judgment that was granted against him. The draft order is couched as follows:

> "It is ordered that:
> 1. The application be and is hereby granted.
> 2. Execution of the High Court's judgment under HC 3569/21 dated 8 September 2021 be and is hereby stayed pending determination of the application under HC 4814/21.
> 3. The first respondent shall pay the applicant's costs of suit."

The first respondent averred that to the extent that the applicant seeks a temporary stay of execution pending the return date, he ought to have sought temporary relief by way of a provisional order in form No. 26A. Mr. *Mugandiwa* for the first respondent argued that an order for stay of execution is a species of an interdict and that for the applicant to seek a final order in an application of this nature, he must show a clear right to the relief sought. Mr. *Mugandiwa* submitted that the applicant had not alleged, let alone proved, any clear right entitling him to a final order.

Mr. *Mutero* for the applicant argued that the final relief being sought is appropriate because the applicant is seeking stay of execution pending determination of the application for rescission of the default judgment. He submitted that once the order is granted there will not be any need for the applicant to come back to court on the return date. He referred to the following cases as his authorities for arguing that a final order for stay of execution can be granted on an urgent basis. *Rushwaya* v *Bvungo* HMA 19/17; *The Registrar General of Elections* v *Combined Harare Residents Association & Anor* SC 7/02; *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (HC); *Enhanced Communications Network (Pvt) Ltd* v *Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (HC).

In *Rushwaya* v *Bvungo* HMA 19/17 MAFUSIRE J said that whilst an application for stay of execution is a species of an interdict, there is some difference between an ordinary, typical or orthodox interdict and a stay of execution. With an ordinary interdict, the applicant must show a clear right in his favour, or in the case of an interim interdict, a *prima facie* right having been infringed, or about to be infringed; an apprehension of an irreparable harm if the interdict was not granted; a balance of convenience favouring the granting of the interdict and the absence of any other satisfactory remedy. With respect to stay of execution, the requirement is simply *real and substantial justice*. He went on to say that the premise on which a court may grant a stay of execution pending the determination of the main matter is the inherent power reposed in it to

control its own processes. For this, MAFUSIRE J relied on the case of *Cohen* v *Cohen* 1979(3) SA 420 (R) wherein it was said:

> "Execution is a process of the court and the court has an inherent power to control its own process subject to the Rules of Court. Circumstances can arise where a stay of execution as sought here should be granted on the basis of real and substantial justice. Thus, where injustice would otherwise be caused, the court has the power and would, generally speaking, grant relief."

See also *Chibanda* v *King* 1983(1) ZLR 116(SC) and *Mupini* v *Makoni* 1993(1) ZLR 80 (S).

From the foregoing it is clear that the requirements for stay of execution are different from the requirements for an ordinary interdict. Mr. *Mugandiwa* was not correct when he made the submission that for the applicant to seek a final order for stay of execution in the present application he needed to allege and show the existence of a clear right. The party seeking stay of execution simply needs to show that circumstances exist justifying a stay. Put differently, the applicant should satisfy the court that an injustice will be caused to him or her or some irreparable harm or prejudice will be caused to him or her if stay of execution is not granted. See *Mupini* v *Makoni supra*. In a way the applicant should thus show that he or she has prospects of success in the main application that is pending determination.

The issue for determination now is, can a final order for stay of execution be granted on an urgent basis? In *Rushwaya* v *Bvungo* an application for stay of execution was brought on the basis of an urgent chamber application. However, it was dismissed on the basis that it had no merit. Nothing in that case shows that even if it had merit, the court was going to grant a final order for stay of execution instead of a provisional order pending the return date.

In *The Registrar General of Elections* v *Combined Harare Residents Association & Anor* it was held at p 8 that:

> "Where the relief sought as interim is essentially the same as the relief sought on the return day, the correct approach should be to proceed by way of an urgent ***court*** application seeking ***final*** relief – See *Econet* v *Mujuru* HH-59-97."(my underlining for emphasis)

In *casu* Mr. *Mutero* sought to argue that the applicant was seeking a final order for stay of execution because if he seeks and is granted a provisional order now, still on the return day, the final order for stay he will be seeking will still be the same as the provisional order. If we go by that argument then it means that the applicant should have approached this court on the basis of an

urgent ***court*** application and not on the basis of an urgent *chamber* application as he did. See *The Registrar General of Elections case supra*. There is a world of difference between an urgent *court* application and an urgent *chamber* application. The procedures that are adopted in prosecuting the two applications are different. The main distinction is that an urgent *court* application should be clearly marked as one and it does not come *via* the chamber book. On the other hand an urgent *chamber* application should also be clearly marked as one and it comes *via* the chamber book.

In the *Kuvarega case*, CHATIKOBO J spoke about the undesirability of seeking an interim relief which is identical to the main relief and having the same effect. Nowhere in that case was it said that if an interim relief being sought is identical to the final relief; then the applicant should ask to be granted a final order in an urgent chamber application.

In *Enhanced Communications Network Pvt Ltd* v *Minister of Information, Posts & Telecommunications* the matter involved an application for an interim interdict. It was dismissed because the court was not satisfied that the applicant was entitled to the interim interdict. I did not see the relevance of this case to the issue at hand which is whether or not a final order for stay of execution can be granted on an urgent basis in an urgent chamber application.

The foregoing discussion of the four cases that Mr. *Mutero* referred to, clearly demonstrates that none of them supports his argument that a final order for stay of execution can be granted on an urgent basis in an urgent chamber application. There was no application to amend the draft order. Effectively, the applicant sought to obtain final relief without proving his case. That is procedurally untenable. The application is therefore fatally defective.

The third preliminary point is upheld.

In the result, it be and is hereby ordered that the matter is struck off the roll with costs.

Maposa & Ndomene, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners